United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

74-1913

In The

United States Court of Appeals

For The Second Circuit

In the Matter of

SAREX CORPORATION,

Bankrupt.

SELENA GOUDEAU,

Plaintiff-Appellee,

vs.

IRVING ARZT, Trustee of Sarex Corporation, Bankrupt,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLEE

LANDAY, ROSEN & MILLER
Attorneys for Plaintiff-Appellee
110 East 59th Street
New York, New York 10022
(212) 832-0500

MICHAEL MILLER
Of Counsel

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TABLE OF CONTENTS

TABLE OF CASES

Page

Rules Cited:

TABLE OF STATUTES

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

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BRIEF OF PLAINTIFF-APPELLEE

ARGUMENT

POINT I

THE DESCRIPTION OF THE ASSETS CONTAINED IN THE SECURITY AGREEMENT IS SUFFICIENT TO INCLUDE ALL OF SAREX' TANGIBLE ASSETS.

The Uniform Commercial Code ("Code") requires that the Security Agreement contain a description of the collateral upon which the lien is to attach (U.C.C.

9-203 (1)(b). The Code provides the standard for a sufficient description at Section 9-110 thereof, as follows:

> "For purposes of this Article, any description of personal property ... is sufficient whether or not it is specific if it reasonably identifies what is described."

The official comments to Section 9-110 give further clarification to the standard of sufficient description, as follows:

> "The requirement of description of collateral (see Section 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it-- that it make possible the identification of the thing described. Under this rule courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called 'serial number' test."

In other words, the Code establishes a test of "reasonably identifies" as the standard to be attained in determining the sufficiency of descriptions of

collateral in security agreements. The issue to be resolved in the instant case is whether the inclusion within the Security Agreement of specifically described collateral following a general description of the assets of Sarex, leads to a conclusion that either (a) the parties did not intend the more generally described assets to be included as collateral for the loan, or (b) that even if the parties did intend the generally described assets to be subject to the lien, that the description of those assets was so general as to not constitute a reasonable identification thereof.

A. <u>The Bankruptcy Judge's Findings of Fact That the Parties Intended to Include the Generally Described Assets in the Lien Under the Security Agreement Is Not Clearly Erroneous</u>.

The (then) Referee found "that the security interest is valid against the trustee for it attached to all items noted on the 'schedule' of the July 15, 1972 security agreement which are 'located either at the Debtor's plant in North Bergen, New Jersey; and in the case of the molds,

also at the plants of contractors who may be using said molds in the manufacture of products for the Debtor' ..." (p.50a). The Bankruptcy Judge found "that it was the intent of the parties, in drawing up the security agreement dated July 14, 1970, to secure payment of the demand promissory note by the tangible physical assets of Sarex; including those assets belonging to Sarex but not located at its place of business in North Bergen, New Jersey, i.e. to include the molds being used by E.G.L. and that this intent is manifested by the very breath of the plain language describing the items of collateral listed on the schedule" (pp.50a and 51a). Judge Babitt founded his Opinion, upon the plain language of the Security Agreement, and, furthermore, felt compelled to so hold by the lack of any evidence presented by the Trustee to indicate an intention of the parties contrary to the broad language used in the document in question (p.51a). Since the record herein supports such a finding, and, further, since there is no evidence to the contrary, such Opinion ought to be sustained as not clearly erro-

neous (Bankruptcy Rule 310).

At this point, to fully understand the basis of Judge Babitt's Opinion, a review of some of the salient facts must be made. On February 12, 1970, Sarex and E.G.L. Enterprises Limited (hereinafter referred to as E.G.L.), entered into an agreement in Montreal, Canada, which provided for the purchase by Sarex from E.G.L. of 5,000,000 cassette covers and bases for a total purchase price to be paid in accordance with a delivery payment schedule to the agreement (p.34a). The agreement then stated that a 1 x 1, and a 2 x 2 mold, were essential for E.G.L. to produce the order for Sarex. The agreement then enumerated that Sarex had purchased from E.G.L. a 1 x 1 mold at a stated price, of which a poriton of the purchase price was to be amortized in the cost to Sarex of the products purchased from E.G.L. The agreement further provided that Sarex was to purchase from E.G.L. a 2 x 2 cavity mold for a stated price. Since the full purchase price of these machines was not paid in full in advance, the agreement provided that Sarex would not remove the

1 x 1 mold until the amortization was completed or until the 2 x 2 mold was paid for in full (p.34a). This type of arrangement was not uncommon since Sarex, in the conduct of its business, was required to install machinery in various plants so that the parts for its products could be specifically manufactured for its use. In other words, although Sarex had its own plant North Bergen, New Jersey, with its own machinery on the said premises, it also had other molds, machinery and equipment, including tools, dies, and component parts thereof "farmed out" to various other enterprises but nonetheless owned by Sarex. The deposition of O. Louis Seda indicated that Mr. Seda was the Chief Executive Officer of Sarex during the years 1970 through 1972. He had made a trip to Canada with the company's then attorney, the late Norman Laithoid, with $10,000. borrowed from his wife, the Appellee herein, for the purpose of paying E.G.L. The $10,000. payment to E.G.L. was necessary to recover Sarex' molds which E.G.L. had seized and sold at auction (pp.36a and 37a).

In summary, therefore, the Appellee's moneys were necessary to enable Sarex to repurchase its molds from

E.G.L.; the molds held by E.G.L. and other contractors were the property of Sarex, but not located at Sarex' plant. When the Appellee advanced the funds to Sarex, she secured herself with a lien on the " machinery, equipment and fixtures; molds, tools, dies (and) component parts" of Sarex and, in order to be certain that any third party investigating the liens on Sarex' property would be placed on notice of her lien, there followed in the description of the collateral a specific enumeration of the machinery (molds) located at E.G.L. and other machinery not located at Sarex' plant.

Therefore, from the facts elucidated at trial, the intent of the parties is clearly evidenced to include all of the assets of Sarex, within the categories plainly stated in the Security Agreement, under Seda's lien to secure her loan. The Bankruptcy Judge characterized the language of the Security Agreement as "reasonably specific" in that it "reasonably indentifie(d)" the collateral which secured the note (p.54a).

B. The Description of the Assets in the Security Agreement Reasonably Identifies the Collateral.

The Trustee has "placed magnified" emphasis upon the recent Second Circuit Court of Appeals case In Re Laminated Veneers, Inc., 471 F.2d 1124 (1973) (p.52a).

The sole issue determined by this Court in the Laminated Veneers case, supra, was whether the word "equipment" contained in a Security Agreement, embraced two (2) automobiles owned by the bankrupt, where, in the same Security Agreement, an enumeration of the specifically pledged items included a truck. This Court held "Certainly the word 'equipment' does not constitute a 'description' of the Oldsmobiles " (471 F.2d at p.1125).

This Court's rationale was to look at the Security Agreement through the eyes of a potential creditor examining the Security Agreement. Such a creditor would discover, it was held, that "(t)he only mention of vehicles of any kind in the agreement (was) the listing of" the truck. Other than that, such a creditor would only find an "omnibus clause" with the generic term "equipment" therein. The creditor would then con-

clude "that the truck as the only vehicle mentioned was the only one intended to be covered" (471 F.2d at p.1125).

In the instant case, the parties plainly stated for all to see, including any hypothetical potential creditor, the specified assets included within the collateral lien. There is no conflict between generic and specific terms as in Laminated Veneers, rather there is a description of all of the assets of Sarex described generally, and in the instance of certain molds, a more specific description to be certain that those molds be included within the lien although they were not located at Sarex' plant.

The only substantial argument offered by the Trustee, other than a blanket application of the Laminated Veneers case, is that the word "all" or the phrase "included but not limited to" being absent from the Security Agreement precludes a construction of the Security Agreement which emcompasses a lien upon the generally described assets. The problem with this argument is that it does violence to a reasonable construction of the plain language utilized in the Security

Agreement. In this regard, an analysis of only one word is necessary, to wit: "including".

In the case of U.S. v. Gertz, 249 F.2d 662, U.S.C.A. 9th Cir. (1957), the court stated as follows at p.666:

> "The word 'includes' is usually a term of enlargement, and not of limitation. As stated in Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95, 100, 62 S. Ct. 1, 4, 86 L. Ed. 65, 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."
>
> * * *
>
> ". . .and 'includes' is used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specifically mentioned."

In Black's Law Dictionary (Fourth Edition) two alternative interpretations are offered for the effect of the word "including":

> ". . .Including may, according to context, express an enlargement and have meaning of and or in addition to, or merely specify a particular thing already included within general words theretofore used. Miller v. Johnson, 173 N.C. 62, 91 S.E. 593. Prairie Oil and Gas Co. v. Motter, D.C. Kan., 1 F. Supp. 464, 468; Decorated Metal Mfg. Co. v. U.S., 12 Ct. Cust. App. 140; In re Sheppards' Estate, 179 N.Y.S. 409, 412, 189 App. Div. 370; Rose v. State, 184 S.W. 60, 61, 122 Ark.

509; United States ex rel. Lyons v. Hines, 103 F.2d 737, 740, 70 App. D.C. 36, 122 A.L.R. 674."

It is important to note that even under the alternative constructions offered by Black's Law Dictionary, the term "including" can either mean an enlargement of the class or an extension of certain units belonging to the class; but, in no event, a limitation of the class.

One case of significance to the instant motion is American Surety Co. v. Marotta, 287 U.S. 513 (1933). That case involved an interpretation of Section 1(9) of the Bankruptcy Act wherein the defined term "creditor" was deemed to "include" anyone with a provable claim in bankruptcy. Again, the court held that "include" is a word of enlargement or extension and not one of limitation.

The court stated as follows at p.517:

> "In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration. Fraser v. Bentel, 161 Cal. 390, 394; 119 Pac. 509. People ex rel. Estate of Woolworth v. State Tax Commn., 200 App. Div. 287,

289; 192 N.Y.S. 772. Matter of Goetz, 71 App. Div. 272, 275; 75 N.Y.S. 750. Calhoun v. Memphis & P.R. Co., Fed. Cas. No. 2,309. Cooper v. Stinson, 5 Minn. 522. Subject to the effect properly to be given to context, Section 1 prescribes the constructions to be put upon various words and phrases used in the Act. Some of the definitive clauses commence with 'shall include,' others with 'shall mean.' The former is used in eighteen instances and the latter in nine instances, and in two both are used. When the section as a whole is regarded, it is evident that these verbs are not used synonymously or loosely but with discrimination and a purpose to give to each a meaning not attributable to the other. It is obvious that, in some instances at least, 'shall include' is used without implication that any exclusion is intended. Subsections (6) and (7), in each of which both verbs are employed, illustrate the use of 'shall mean' to enumerate and restrict and of 'shall include' to enlarge and extend. Subsection (17) declares 'persons' shall include corporations, officers, partnerships, and women. Men are not mentioned. In these instances the verb is used to expand, not to restrict. It is plain that 'shall include' as used in subsection (9) when taken in connection with other parts of the section cannot reasonably be read to be the equivalent of 'shall mean' or 'shall include only.'"

New Jersey law is clearly applicable to the within proceeding.

The New Jersey cases which deal with the issue of the legal effect of the word "including" are as follows:

"I. Fraser v. Robin Dee Day Camp, 210 A.2d, 208, 211, 44 N.J. 480.

In this case the court determined that where the term 'Places of public accomodation' was used in a statute after which the phrase 'shall include' was utilized and specific examples were then enumerated, the non-enumerated places of a similar nature were to be deemed included within the general phrase.

II. Cuna v. Board of Fire Commissioners; Avnel 200 A.2d 313, 320, 42 N.J. 292.

The court in this case held that the term 'include' is a word of enlargement and not one of limitation.

III. Marx v. Rice, 65 A.2d 48, 51, 1 N.J. 574.

This case involved a Will which contained a power of appointment requesting that the appointment 'include' deserving blood relatives of the testator. The court held that appointees were not limited to blood relatives since the word 'include' makes clear a purpose not to confine the class to testator's blood relatives.

IV. Farmer's National Bank of New Jersey v. Cook, 32 N.J.L. (3 Vroom) 347, 351.

In this case the court utilized the Webster Dictionary definition for the term 'include', i.e., to confine, to hold, to contain, to shut up or to enclose.

V. Baker v. Soltau, 118 A. 682, 683.

This case involved a bequest qualified

> by an inventory headed with the phrase 'consisting of'. The court held that the inventory determines the extent of the bequest but further noted that if the phrase had been 'including' there would be no implied exclusion of items not mentioned."

It is clear from the above authority that in the State of New Jersey the term "include" or "including" indicates that there are other items of a similar nature to those enumerated which have not been specifically stated. It is, therefore, evident that in the instant action the security interest of Seda comprises the machinery, equipment, molds, etc., of the debtor to the extent of her security interest.

CONCLUSION

> The finding of fact and law of Bankruptcy Judge Babitt were clearly correct: Both Sarex and Seda clearly intended to include within the lien created by the Security Agreement all of the stated assets of the bankrupt, and this intention was clearly embodied in the plain language used in the Security Agreement which sufficiently described the assets so that the same were reasonably identified for all

purposes. Bankruptcy Judge Babitt and District Judge Pierce should be affirmed.

Respectfully submitted,

LANDAY, ROSEN AND MILLER
Attorneys for Appellee

MICHAEL MILLER,
Of Counsel

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

SAREX CORP.,
Bankrupt

SELENA GOUDEAU, against PLAintiff-Appellee,

ARZT,
Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 16th day of October 1974 at 40 Exchange Place, NYC

deponent served the annexed Appellee's Brief upon

Henry & Brecker

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 16th day of October 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975